

**IN THE SUPREME COURT OF THE
STATE OF MISSOURI**

SC085824

**IN THE SUPREME COURT OF THE
STATE OF MISSOURI**

STATE OF MISSOURI)	
Ex rel. N.H.L.,)	
)	
Relators,)	
)	SC085824
vs.)	
)	
THE HONORABLE)	
Tom W. DePriest, Jr.,)	
)	
Respondent.)	

REPLY BRIEF OF RELATOR

Kathleen C. DuBois, No. 49563
501 South Brentwood Blvd.
Clayton, Missouri 63105
Telephone: (314) 615-4507
Facsimile: (314) 615-4477

Chris E. Rollins, No. 44832
4232 Forest Park Avenue
St. Louis, Missouri 63108
Telephone: (314) 534-4200
Facsimile: (314) 534-7515

Attorneys for Relator

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Point Relied On

1. Relator is entitled to an order prohibiting Respondent from entering final orders in the adoption of or requiring Respondent to set aside said orders if entered regarding A.J.L.H. because finalizing the adoption prior to Relator exercising her rights to appeal violates her fundamental rights as a parent in that Relator has an ongoing familial relationship with her child, guaranteed by Missouri Law and the Constitution of the United States, until the appropriate Court considers and determines the merits of her appeal of the decision to terminate her parental rights. Adoptions of children with living parents cannot happen prior to the termination of the parents' rights to raise those children, including any and all active appeals regarding such termination. (Brief of Relator p. 8).

Argument

Standard for Issuing a Writ of Prohibition

Relator acknowledges that Respondent has quoted the third standard correctly as stated in *State ex rel. Proctor v. Bryson*, 100 S.W.3d 775, 776 (Mo. banc. 2003).

3. where a party may suffer irreparable harm if relief is not made available in response to the trial court's order.

The standard recited by Respondent is broader in its application than the version Relator referred to in her moving brief. Respondent has thus supported Relator's argument. She currently has and in the future may suffer irreparable harm if relief is not granted by this Court.

Relator's rights were terminated by the trial court on January 12, 2004. Relator's appeal is pending before the court of appeals. Respondent filed a Motion for Extension of Time to file their response brief (A.5-6) which has been granted. The due date is now on or about June 11, 2004. The reply brief would be due on or about June 21, 2004 and oral arguments have yet to be set. Relator has filed a Memorandum response with the Eastern District concerning Respondent's request. (A.7-9). Even without any **additional** delays there is no guarantee that the final disposition of her appeal will be with the one year time frame dictated by Section 453.140.

In addition to being procedurally barred from re-establishing her legal parent-child relationship if she prevails on appeal, currently, she and her child are

barred from the benefits the legal relationship provides. There are numerous tangible benefits that the parties have lost because the trial court did not stay the adoption as requested. For example, Relator and her child are not currently afforded the rights of intestate succession nor can the child obtain any benefits he would be entitled to if she was declared disabled. Under the new HIPPA regulations, conceivably the child would be barred, should he experience a medical emergency, from obtaining an updated medical history of his mother, or likewise from getting any information regarding his mother's health if she were hospitalized, because of his third party status at this time. Moreover, the child's brother is no longer his brother. Neither child has any further legal rights to sibling visits.

Although the standard does not require proof of actual irreparable harm to prevail on the Petition in Prohibition, Relator is currently suffering tangible harm and may be procedurally barred from reestablishing the legal relationship with her child. Relator contends that staying the adoption would allow the appellate process to run its course without any intended or unintended consequences occurring as discussed above. Relator moved to have the adoption stayed until final disposition of her appeal. (A.3-4). That motion was denied. A Petition of Prohibition is the appropriate procedural step to protect both her child and herself while the appeal is pending. A Writ of Prohibition is the appropriate remedy.

I. Relator is entitled to an order prohibiting Respondent from entering final orders in the adoption of or requiring Respondent to set aside said orders if

entered regarding A.J.L.H. because finalizing the adoption prior to Relator exercising her rights to appeal violates her fundamental rights as a parent in that Relator has an ongoing familial relationship with her child, guaranteed by Missouri Law and the Constitution of the United States, until the appropriate Court considers and determines the merits of her appeal of the decision to terminate her parental rights. Adoptions of children with living parents cannot happen prior to the termination of the parents' rights to raise those children, including any and all active appeals regarding such termination.

Relator submits to this Court that it has been long held that “[a]n obvious prerequisite to any adoption is the consent of the natural parents or the involuntary termination of their parental rights.” *In the Matter of J.F.K.*, 853 S.W.2d 932, 934 (Mo. banc 1993). This Court relied upon Sections 453.030 and 453.040 for this statement of law. *Id.* As in *J.F.K.*, Relator has not consented to the adoption of her child and she is currently appealing the findings that she abandoned and neglected her child.

Contrary to Respondent's position that he disagrees with Relator's statement that there are two separate and distinct elements necessary before a judgment can be entered, it is this exact “*unbundled*” version of the proceedings and the procedure surrounding adoptions that must be examined with this Petition of Prohibition regardless of the fact that in the trial court the two elements proceed in tandem. *In the Interest of D.S.G.*, 947 S.W.2d 516, 518 (Mo. App. E.D. 1997).

Therefore whether the adoption decree is entered into at the same moment as the termination of Relator's rights or as in *State ex rel. T.W. v. Ohmer*, ____ S.W.3d ____ (Mo. banc March 30, 2004) several months after the termination, the outcome must be the same. If appealed, the adoption must be stayed until final disposition of the appeal.

A. Relator has the right to a meaningful appeal of the termination of her parental rights and the adoption of her child.

1. Validity of decree not subject to attack for irregularities after expiration of one year. Section 453.140.

As Relator has indicated *infra* the clock began to tick on January 12, 2004. A fair reading of the statute indicates that after the expiration of one year, January 13, 2005, the validity of the decree "shall not be subject to attack in *any proceedings* ... by reason of *any irregularity* in proceedings had pursuant to this chapter." Section 453.140. The statute states that the invalid attack could come from either a *direct or collateral* proceeding. Presumably a reversal by an appellate court would be considered to be a proceeding directly relating to the decree. This statute intimates that both Relator and her child would be forever barred to re-establish their legal relationship if she prevailed after January 12, 2005.

Respondent cites *In re Kerr*, 547 S.W.2d 837(sic), 839(sic) (Mo. App. 1977). The court in *Kerr* supports the one year limitation in its holding and goes

on to say the appellate would have been barred from bringing his claim even if it was a valid one. *Id.*

Apparently appellant elected not to avail himself of the opportunity to appear in person or by counsel at the hearing on the petition for adoption and present the evidence he now asserts would have been material. The basis advanced by appellant to challenge the decree of adoption falls squarely within the meaning of the term "irregularity in proceedings" as used in the above statute of limitation. This unquestionably is correct because even in the absence of this statute appellant would not have been entitled to challenge the decree for the reason alleged in his petition.

2. Principles of Due Process requires that a trial court stay finalization of an adoption where the parent's appeal of that decision remains pending.

Contrary to Respondent's contention, Relator has preserved her right to assert that the trial court's action violates her Due Process rights under the Constitution. The trial court had the authority to enter a judgment and decree in the underlying action pursuant to Section 453.040. Relator filed a motion with the trial court to stay the adoption until the final disposition of her appeal. The trial court denied this motion. (A.1-2). That denial violated her Due Process rights.

Relator immediately acted to preserve her rights by filing this Petition in Prohibition. Given the state of Missouri law the date she filed the Petition in

Prohibition, Relator understood, pursuant to Rule 120(b), that she had to file a motion to stay the judgment. The Rule states “neither the filing of a notice of appeal nor the filing of any motion subsequent to the judgment shall act to stay the execution of a judgment unless the court enters an order staying execution.”

Subsequent to this Petition in Prohibition being filed, this Court announced in *State ex rel. T.W. v. Ohmer*, ____ S.W.3d ____ (Mo. banc March 30, 2004) that while an appeal of a termination of parental rights is pending, it is an abuse of discretion and a circuit court lacks the authority to proceed with an adoption. Since a termination of parental rights must happen in this case because Relator did not consent to the adoption, it logically flows that the adoption must be stayed until final disposition of her appeal.

Missouri law currently envisions that adoptions should not become final until the “rights of all parties” are guaranteed. Section 453.011.3.

3. A survey of recent precedent in Missouri and authority from other states militates that Relator’s request to stay the adoption of her child while there is a review of her termination of her parental rights should have been granted.

Respondent makes the argument that “the appellate court, in considering the termination of parental rights issue under a Missouri Chapter 453 proceeding, is not required to address a separate adoption proceeding as an effective condition to ‘reverse a termination.’” (Resp. Brief p. 13). While it is true that in this case,

under Chapter 453, both the termination of Relator's rights and the adoption of her child occurred seemingly simultaneously, Respondent's statement is in direct contradiction with Missouri law. If the trial court incorrectly determined that Relator abandoned and neglected her child, the trial court lacked jurisdiction to enter the decree of adoption. This Court has stated that proceeding with an adoption while the termination is reviewed on appeal compromises the parent's right to appellate review. *T.W.*, ___ S.W.3d at ___.

Each of the cases cited in Relator's moving brief likewise stand for the proposition that finalizing an adoption in any situation while an appeal is pending is contrary to the structure of the justice system (*In re JK*, 661 N.W.2d 216, 225 (Mich.2003)) is ill advised because any termination of parental rights is subject to careful scrutiny on appeal and reversal is always a possibility. *Kobinski v. State, Welfare Div.*, 738 P.2d 895, 898 (Nev. 1987).

Maintaining the status quo, as Relator requested with her Motion to Stay filed with the trial court, preserves everyone's rights, Relator's, child's and guardians'. Relator understands that guardians maintain custody of her child and would most likely do so even upon prevailing on appeal. Relator consented to the guardianship of her child because all the parties agreed that the child was better cared for under the guardians' care. Relator however never consented to adoption of her child and appeals the termination of her rights.

Respondent seems to imply that Relator is unconcerned with what is in the best interest of her child because she filed this Petition in Prohibition. (Resp. Brief

p. 15). To the contrary the thrust of Relator's entire brief on appeal in the Eastern District outlines the fact that the best interest of her child was not weighed nor determined by the trial court under the standards set forth in Chapter 453. She in fact contends that the clear and convincing standard does not support the findings of the trial court. While it is inappropriate to discuss the merits of the appeal during these proceedings, Relator respectfully disagrees that she is in any way trying to diminish the rights of her child in these proceedings. (Resp. Brief p. 15).

Conclusion

Relator's intent in filing this Petition for Prohibition is to protect her and her child's rights as guaranteed by the Constitutions of the United States and the State of Missouri. Wherefore Relator prays that this Court enter a Writ in Prohibition requiring Judge DePriest to stay the finalization of the adoption in order that Relator's appeal can be considered on its merits and decided by the appropriate Court without compromising competing interests.

Respectfully submitted,

By: _____
Chris E. Rollins, Mo. Bar No. 44832
Attorney for Relator
Legal Services of Eastern Missouri
4232 Forest Park Ave
St. Louis MO 63108
Telephone: (314) 534-4200
Facsimile: (314) 534-7515

By: _____
Kathleen C. DuBois, Mo. Bar No. 49563
Attorney for Relator
Legal Services of Eastern Missouri
501 South Brentwood Blvd.
Clayton, MO 63105
Telephone: (314) 615-4507
Facsimile: (314) 615-4477

Certificate of Compliance

Comes now counsel for Relator and certifies that:

1. The brief complies with Rule 55.03 in that it is signed, not filed for an improper purpose, the claims are warranted by existing law, and the allegations are supported by evidentiary support,
2. The brief complies with Rule 84.06(b),
3. The number of words contained in the brief is approximately 2,495 as listed by the word processor the document was prepared on.
4. The disk has been scanned for viruses and it is virus-free.

Kathleen C. DuBois

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